(1)

Supreme Court, U.S.
FILED

94 471 AUG 3 1994

OFFICE OF THE CLERK

UNITED STATES SUPREME COURT

October Term 1994

MARK BABINSKI,
Petitioner

v.

PATRICIA REGUCCI, ZOFIA BABINSKI,
JOHN AKERS, RICK HELLAN
Respondents

Case No.

PETITION FOR

WRIT OF CERTIORARI

to

THE U.S. COURT OF APPEALS
FOR THE THIRD CIRCUIT

Mark Babinski
Petitioner, Pro Se

85 5th Ave.
Garwood, N.J. 07027
Tel.: (201) 654-0596

56 pp

QUESTION PRESENTED FOR REVIEW

The question is whether a person who omits to perform an act which she is legally required to do under state law (through that omission causing another to lose a fundamental liberty right) is a person subjecting another to a deprivation of a constitutional right within the meaning of Section 1983 ?

The question deals with the denial of visitation to a non-custodial parent by a State Judge during a Plenary Hearing, prior to which hearing the custodial parent was ordered to provide the child with counseling through a Court-appointed agency. Is the custodial parent liable under Section 1983 if she secretly provided counseling to the child through her private and not through the Court-appointed psychologist and then misled the State Judge to believe that the counseling was done as he ordered ?

The 5th and the 9th Circuit Courts of Appeal decided that under the preceding described circumstances the person omitting to perform an act that she is legally required to do is liable under Section 1983.

In my case the 3rd Circuit Court of Appeals affirmed the summary dismissal of my Complaint against such a person precisely because the custodial parent's "activities were contrary to orders issued by a New Jersey judge", i.e the defendant did not perform the act that she was legally required to do. [1]

This Court is asked to resolve the conflicting positions on this matter held by the 5th and 9th Circuit Courts of Appeal and the one taken by the 3rd Circuit Court of Appeals.

---

[1]. OPINION, dismissing Complaint - APPENDIX, Exhibit B, p. 11.

A secondary question, arising because of the decision of the 3rd Circuit in this case, is the issue of liability under Section 1983 of state actors if they deprive a person of a constitutional right under color of state law unknowingly following illegal rules secretly created by a private party - in violation of state rules which the state actors believe they are applying. Is such a state actor liable or not ?

The 3rd Circuit's interpretation of case law laid out by this Court in 1988, appears to place an extreme burden on State Judges within its jurisdiction, by deciding that under these circumstances the state actor unwittingly applying secret rules created by private parties is liable under Section 1983.

LIST OF PARTIES

Mark Babinski,	APPELLANT Plaintiff in District Court Appellant in Third Circuit Court of Appeals
Patricia Regucci,	APPELLEE Defendant in District Court Appellant in Third Circuit Court of Appeals
Zofia Babinski,	APPELLEE Defendant in District Court

My original Complaint listed 4 Defendants - Zofia Babinski, Patricia Regucci, John Akers - employer of Zofia Babinski, Rick Hellan - employer of Patricia Regucci. The Complaint was dismissed as to all 4 Defendants.

The appeal I took to the Court of Appeals for the 3rd Circuit was only in regard to the dismissal of Complaint against Zofia Babinski and Patricia Regucci. I did not contest the dismissal of the Complaint against the other two Defendants.

The Court of Appeals for the 3rd Circuit affirmed the lower District Court's dismissal of the Complaint in its entirety.

In this appeal to the U.S. Supreme Court I am appealing the dismissal of my Complaint only in regard to Zofia Babinski and Patricia Regucci. The other two original Defendants are listed in the caption of this case only because of the Appellate Court rules.

Zofia Babinski did not appear Pro Se nor did she provide any representation for herself at the District Court level or the 3rd Circuit Court of Appeals.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES iv

TABLE OF AUTHORITIES vii

REFERENCES TO ORDERS AND OPINIONS .. viii

JURISDICTION .....p. 1-2

CONSTITUTIONAL PROVISIONS/STATUTES
THAT THIS CASE
INVOLVES ..... p. 3-5

CONCISE STATEMENT OF THE CASE ... p. 6-20

WHY THE QUESTIONS PRESENTED
ARE SUBSTANTIAL TO MERIT
REVIEW BY THIS COURT ..... p. 21-26

APPENDIX
(with Exhibits A, B, C)

TABLE OF AUTHORITIES

Dennis v. Sparks
449 U.S. 24 (1980)
.... p. 20

Hafer v. Melo
502 U.S. --- (1991),
112 S.Ct. 358,
116 L.Ed. 2d 301
.... p. 14

Johnson v. Duffy
588 F.2d 740 (9th Cir. 1978)
.... p. 22

Lugar v. Edmonson Oil Co.
457 U.S. 922 (1982)
.... p. 12

National Collegiate Athletic Association v. Tarkanian
488 U.S. 179 (1988)
.... p. 5, 13, 14, 15, 16, 17, 25

Santosky v. Kramer
451 U.S. 527 (1981)
.... p. 18

Sims v. Adams
537 F.2d 829 (5th Cir. 1976)
.... p. 22

REFERENCE TO ORDERS AND OPINIONS

My Complaint was filed in the U.S. District Court, District of New Jersey on December 31, 1992.

Hon. H. Lee Sarokin, U.S.D.J. after reviewing motions for dismissal filed by Defendants Patricia Regucci and John Akers dismissed my Complaint as to all 4 Defendants in ORDER (APPENDIX - Exhibit A) dated August 11, 1993. To support his decision the Judge issued an OPINION (APPENDIX - Exhibit B) also dated August 11, 1993.

In September 1993 I filed an appeal to the U.S. Court of Appeals for the 3rd Circuit asking to overturn the dismissal of Complaint only in regard to Defendants Zofia Babinski and Patricia Regucci. After a series of Briefs by me and Patricia Regucci the 3rd Circuit issued a JUDGMENT ORDER (APPENDIX - Exhibit C) in

which it affirmed the lower Court dismissal of my Complaint. No OPINION was issued by the U.S. Court of Appeals for the 3rd Circuit.

On May 27, 1994 the U.S. Court of Appeals for the 3rd Circuit certified its May 5, 1994 Judgment Order as a true copy issued in lieu of a formal mandate (APPENDIX - Exhibit C).

JURISDICTION

My Complaint was filed in U.S. District Court asking for damages pursuant to 42 U.S.C. 1983. Because the Complaint was dismissed I asked the U.S. Appeals Court for the 3rd Circuit to review the matter arguing that Defendants Zofia Babinski and Patricia Regucci were liable under Section 1983. Because the Appeals Court affirmed the lower Court ruling I am asking this Court to review the matter.

I am appealing here the JUDGMENT ORDER (APPENDIX - Exhibit C) entered on May 5, 1994 by Judges Stapleton, Hutchinson and Roth of the U.S. Court of Appeals for the Third Circuit affirming in its entirety the ORDER Dismissing Complaint (APPENDIX - Exhibit A) entered by Judge H. Lee Sarokin, U.S.D.J. on August 11, 1993 in U.S. District Court, District of New Jersey.

This matter involves issues of liability under Title 42 Section 1983 of the United States Code - which confers jurisdiction on the appeal to this Court.

CONSTITUTIONAL PROVISIONS/STATUTES THAT THIS CASE INVOLVES

14th AMENDMENT

> Section I. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In this case I claim that my 14th Amendment rights were violated. Specifically, I claim that I was denied liberty (visitation rights with minor son Thomas) under color of state law (final action denying visitation by a State Judge) without due process (Zofia Babinski using a different doctor to provide psychological counseling to my son Thomas than ordered by the State Court Judge). This is prohibited by the 14th Amendment.

TITLE 42 SECTION 1983
of the United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 of Title 42 of the United States Code is used here because relief can be granted under this statute if conduct complained of deprived me of the rights secured by the 14th Amendment and was committed by a person acting under color of state law.

14th Amendment issues described above and claims for relief based on 42 U.S.C. 1983 were raised in the Complaint filed in District Court.

The 14th Amendment and Section 1983 issues were again presented in my appeal to the Third Circuit Court of Appeals of the District Court's dismissal of my Complaint.

Additionally, in my appeal briefs to the 3rd Circuit I raised the issue of the incorrect application of the case law laid out by the United States Supreme Court in National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179 (1988), which application gives rise to my secondary question dealing with Section 1983 liability of state officials because of actions of private parties. See iii.

CONCISE STATEMENT OF THE CASE

I was divorced from my ex-wife, Defendant Zofia Babinski, on May 2, 1988. Zofia Babinski retained physical custody of my then 8-year old son Thomas while I was granted limited visitation rights. Within a few months of the divorce I applied to the Superior Court of New Jersey for an expansion of these visitation rights.

Hon. John M. Boyle, J.S.C. entered a series of Orders requiring my son Thomas to undergo psychological counseling prior to a Plenary Hearing dealing with expanding my visitation rights. These Orders were entered on July 22, 1988, August 18, 1988, November 18, 1988. These Orders required that my son Thomas obtain psychological counseling "to assist the child with the problems he is having over the separation of his parents" [11/18/88 Order] through a Court-appointed agency -

the Family & Children's Counselling and Testing Center of Elizabeth, New Jersey.

In his November 18, 1988 Order Judge Boyle scheduled a Plenary Hearing to deal with expanding my visitation for January 26, 1989. The date was set to permit for prior treatment of my son Thomas by the Family and Children's Counselling and Testing Center. My son Thomas was to be interviewed by the Judge at the time of the Plenary Hearing.

The Judge's authority to Order treatment of my son lies in New Jersey Court Rule R.5:3-3 Appointment Of Experts - within R.5:3 General Provisions For Family Actions of the Rules Governing Practice In The Chancery Division, Family Part. It is a custom and policy of the State courts to enter such Orders in family matters. The Family & Children's Counselling and Testing Center was the Court-appointed agency because the Court

had a contract with that agency to provide such services to Union County litigants in family matters.

By letter dated January 19, 1989 the Family & Children's Counselling and Testing Center informed Judge Boyle that "[w]ith regard to Mrs. Babinski and the child, Thomas, we have no record that Mrs. Babinski contacted our office to schedule follow-up evaluation and treatment for herself or her son". Judge Boyle cancelled the January 26, 1989 Plenary Hearing and entered a new Order, dated January 26, 1989 in which he made Zofia Babinski (the physical custodian of Thomas) an agent of the State in regard to providing treatment to my son Thomas by

> "ORDER[ING], that plaintiff, Zofia Babinski, immediately make an appointment for the infant child, Thomas, for an evaluation, therapy and counselling through the Family & Childrens Counselling and Testing Center"

As I pointed out in my December 31, 1992 Complaint in the District Court:

"Defendant Zofia Babinski did not comply with Judge Boyle's January 26, 1989 Order regarding herself and Thomas being provided with counseling through the Family and Children's Counseling and Testing Center. Neither she nor my son Thomas received any counseling or therapy through that organization.

Instead, on February 9, 1989 (just 4 days prior to Thomas' evaluation by the Family and Children's Counseling and Testing Center) Defendant Zofia Babinski took my son Thomas for counseling to Defendant Patricia Regucci, an employee of Personal Performance Consultants, Inc.

Defendant Patricia Regucci provided counseling to my son Thomas fully aware that it was in preparation for his Court ordered evaluation on February 13, 1989 and a future Plenary Hearing regarding my

visitation rights. [...] Most importantly, Patricia Regucci fully aware that under Court Orders she was not to provide counseling, did so, brainwashing my son Thomas to instill in him good feelings towards his mother and bad feelings towards me. [...]"

On April 19, 1989 a Plenary Hearing was held regarding expansion of my visitation rights with son Thomas. As a result of the illegal counseling provided by Patricia Regucci to my son Thomas, Judge John M. Boyle denied me the requested expansion of visitation with Thomas.

In 1990 I found out that Patricia Regucci rendered some services to my son Thomas. At the time of the April 19, 1989 Plenary Hearing neither Judge Boyle nor I were aware that Zofia Babinski disobeyed Judge Boyle's Orders and that Thomas received psychotherapy from Patricia Regucci rather than from the Family &

Children's Counselling and Testing Center.

In March 1991 I found out that the services rendered to my son Thomas by Patricia Regucci were related to the April 19, 1989 Plenary Hearing dealing with visitation.

When I realized that during the April 19, 1989 Plenary Hearing before Judge Boyle, my son Thomas was interviewed by the Judge having been provided secret psychotherapy by Defendant Patricia Regucci and no psychotherapy by the Family & Children's Counselling and Testing Center I filed this federal lawsuit. I brought this lawsuit pursuant to 42 USC 1983 because, due to actions of Defendants Zofia Babinski and Patricia Regucci,

> "on April 19, 1989 Hon John M. Boyle, J.S.C., under the color of state law, custom and policy denied me the liberty of visitation with son Thomas - without due process" [Complaint]

Immediately after the divorce my contact with my son Thomas was limited to a few hours every second weekend. This limited contact was imposed through the Final Judgment of Divorce entered by a State Judge.

Despite the fact that it was a State Judge, Hon John M. Boyle, who cloaked defendant Zofia Babinski with the state-created exclusive authority (or "right" or "privilege") to deliver Thomas for counseling to the agency with which the state court had a contract, the U.S. District Court Judge stated in his Opinion, [EXHIBIT B, p.10], citing from Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982) that:

> ", the court concludes that plaintiff has failed to allege that his deprivation was 'caused by the exercise of some right or privilege created by the State or a rule of conduct imposed by the State or by a person for whom the State is responsible.'"
> (emphasis added)

Judge H. Lee Sarokin concentrated on the lack of exercise of a "rule of conduct imposed by the State" (Zofia Babinski did not follow the prescribed conduct) and did not address the issue of the exercise of the "right or privilege created by the State" for Zofia Babinski to be the exclusive deliverer of Thomas to the state approved agency for counseling. But then in his Opinion, [EXHIBIT B p. 13] the Judge, citing from National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179 (1988), stated that

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."
> (emphasis added)

That "misuse" means acting contrary to the state created authority, like in case of Zofia Babinski here, was established by the U.S. Supreme Court already in 1961

in Monroe v. Pape, 365 U.S. 167 at 171, again in 1974 in Scheuerer v. Rhodes, 416 U.S. 232 at 243, and recently in 1991 in Hafer v.Melo, 502 U.S. --- (1991), 112 S.Ct. 358. In Hafer this Court stated:

> "Congress enacted Section 1983 "'to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it'". Scheurer v. Rhodes, 416 U.S. 232, 243, 94 S.Ct. 1683, 1689, 40 L.Ed. 2d 90 (1974) (quoting Monroe v. Pape, supra, 365 U.S., at 171-172, 81 S.Ct., at 475-476)."
> (emphasis added)

The District Court Judge dismissed my Complaint using in his Opinion, [EXHIBIT B, p.13], the guidance of Tarkanian. The Judge stated, that my

> "[c]ase is like Tarkanian in that the final act challenged by plaintiff is the decision by Judge Boyle, clearly a state actor, not to increase plaintiff's visitation rights with Thomas. It is also like Tarkanian in that plaintiff seeks to hold defendants, who are private

actors, liable for the alleged influence that defendant Regucci's alleged "brainwashing" of Thomas had on Judge Boyle's decision." [EXHIBIT B p. 13]

In Tarkanian the U.S. Supreme Court found that the state actor who committed the final act was liable under Section 1983 but the private actor, whose recommendation regarding the final act challenged was accepted and used by the state actor, was not liable.

In Tarkanian the state actor held no power over the private party - i.e. the state actor did not cloak the private party with any authority to create and promulgate regulations and recommendations. The Court found that the set of recommendations regarding conduct, created by the private party, was formulated openly and independently of the state actor.

However, in this case, by applying Tarkanian, the District Court Judge and the 3rd Circuit broadened the scope of protection offered a private party under Tarkanian, by including private parties cloaked with the authority of the state.

In the case at hand the deprivation of a constitutional right caused by a state actor (State Judge) guided by conduct of a private party cloaked with the authority of the state (Zofia Babinski, who had the exclusive right to provide Court-ordered psychological treatment) did not make the private party liable under Section 1983, according to Judge Sarokin. That the state actor had full power over the private party is evident here by the fact that Judge Boyle cancelled the originally scheduled Plenary Hearing when he found out that his regulations were not follwed by the private party and ordered the party to comply.

Unfortunately, the 3rd Circuit affirmed that if the state judge is under the illusion that the regulations created and promulgated by himself are being applied then the private party is not liable under Section 1983 for misleading the state actor, for secretly and independently creating new regulations and recommendations, and for forcing the state actor to unwittingly use these new regulations.

On the other hand the District Court and the 3rd Cicuit Court of Appeals left intact the basic presumption of Tarkanian that the state actor is liable under Section 1983 - in this case for having incorrectly applied to another person the secret regulations and recommendations of a private party. [2]

---

[2]. The State Judge, Hon. John M. Boyle, was not named by me as defendant in this or any other case. Why should he be ? By cancelling the originally scheduled Plenary Hearing, he clearly indicated that he would not have permitted a new hearing if he knew that Zofia Babinski did not follow his Orders.

Does that mean that any Judge in a state Family Court when deciding on matters dealing with visitation and custody and acting as he/she does because of misleading or false information supplied by one of the private parties is automatically liable under Section 1983 if he/she makes any decision (granting or denying) petitioner's application ? This Court has implied in Santosky v. Kramer, 455 U.S. 745 (1982), at 753, that the Judge has to provide a parent with "fundamentally fair procedures" because in matters of visitation and custody parents have a "fundamental liberty interest".

Specifically, the Court stated in Santosky, at 753:

> "The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment. [...] When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."

What is the level of inquiry that a Judge would have to subject both parties in a visitation/custody proceeding to establish if his Orders were followed before his decision regarding these matters would not subject him to liability under Section 1983 ?

Unlike defendant Zofia Babinski who was a state agent by virtue of Judge Boyle's orders, Patricia Regucci acted as a private person when rendering services to my son Thomas. However, she conspired jointly with a state agent, Zofia Babinski, to have Judge Boyle deny me without due process visitation with son Thomas.

Patricia Regucci as a <u>private person</u> acting jointly with a <u>state agent</u>, Zofia Babinski, is liable under Section 1983. Of course, if the U.S. Supreme Court finds that Judge Sarokin did not err in dismissing my Complaint against Zofia

Babinski then I have no standing in my action against Patricia Regucci. However, if the U.S. Supreme Court finds that Zofia Babinski was a state agent and Judge Sarokin's decision regarding that defendant is overturned then the same should apply to Defendant Patricia Regucci.

> 'Private persons, jointly engaged with state officials in a challenged action, are acting "under color" of law for purposes of Section 1983'
>
> Dennis v. Sparks, 449 U.S. 24 (1980)

WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL TO MERIT REVIEW BY THE U.S. SUPREME COURT

The 3rd Circuit does not appear to have any cases decided which would indicate that it is of the opinion that a person who omits to perform an act that he/she is legally required to do under State law is liable within the meaning of Section 1983.

By affirming the lower Court dismissal of my Complaint and relying on the District Court's Opinion, the 3rd Circuit in effect accepted Judge Sarokin's proposition that in the Third Circuit a private person who omits to perform an act that he/she is legally required to do under State law is not liable within the meaning of Section 1983.

But the 5th Circuit and the 9th Circuit have decided that persons are liable under Section 1983 in the circumstances of Zofia Babinski by

stating in Johnson v. Duffy (9th Cir. 1978) 588 F.2d 740, 743 (citing from Sims v. Adams (5th Cir. 1976) 537 F.2d 829):

> "A person "subjects" another to the deprivation of a constitutional right, within the meaning of Section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made."
> (emphasis added)

By deciding my case the U.S. Supreme Court can resolve the conflict between the opinions on these matters of the 5th Circuit, 9th Circuit and the 3rd Circuit U.S. Courts of Appeal.

The impact of a U.S. Supreme Court decision would be significant because of the large number of cases decided annually in State Courts on issues of visitation and custody. This is clear from the latest statistical data provided below, not only for New Jersey but also

for the two large neighbouring States of New York and Pennsylvania.

In New York in 1993 (latest year data available) the total number of filings in Family Courts was 591,556 of which 75,685 or 12.79% were filings dealing with the administrative court classification "Custody of Minors". [3]

In Pennsylvania in 1992 (latest year data available) the total number of filings in Family Courts was 317,059 of which 27,680 or 8.73 % were filings dealing with the administrative court classification "Custody/Partial Custody /Visitation". However, these issues of custody could also appear as part of the "Divorce" filing classification (46,075 or 14.53% of the total filings). [4]

---

[3]. Table 2-8, Filings and Dispositions in Family Courts Statewide by type of Petition - statistical data provided by the State of New York Unified Court System Office of Management Support, 80 Center Street, New York, N.Y. 10013, tel.: (212) 417-4781.

The New Jersey data supplied by the Administrative Office of the Courts is more difficult to interpret bacause of different classifications. In New Jersey in 1993 (latest year data available) the total number of filings in Family Courts was 339,986. Of these cases the administrative offices of the courts have classified 54,064 or 15.90% as "Dissolution" and 120,652 or 35.49% as "Non-Dissolution". These two New Jersey classifications include matters of both divorce and custody/visitation. [5]

If one applies to New Jersey the Divorce versus Custody case distribution of Pennsylvania (46,075 vs. 27,680) the number of cases dealing with custody/partial custody/visitation in New Jersey would be 65,570 or 19.29% of the total Family Court filings.

---

[4]. Statistical data supplied by the Administrative Office of Pennsylvania Courts, 1515 Market Street, Philadelphia, PA 19102, tel.: (215) 560-6300.

A Supreme Court decision in my case would have a broad impact on visitation/custody proceedings in State Courts, i.e. possibly compel parties to follow Court Orders regarding visitation /custody proceedings or risk liability under Section 1983.

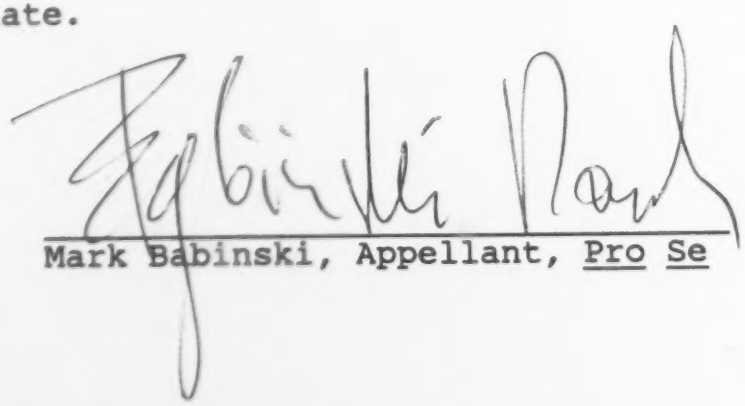
By reviewing my case this Court can also clarify the issue of Section 1983 liability on the part of State Judges when they act in violation of the 14th Amendment not knowingly but unwittingly based on incorrect conduct and information provided by the private parties. The 3rd Circuit decision to apply Tarkanian to my case appears to place a great burden of verification of private party conduct on State Judges.

---

[5]. Statistical data provided by the Administrative Office of the Courts, State of New Jersey, Richard J. Hughes Justice Complex, CN 037, Trenton, N.J. 08625, tel.: (609) 984-7231.

Because many petitioners in Family Court are not lawyers and represent themselves Pro Se, like me, there is a question whether this burden of verification of private party conduct can be reasonably placed on the opposing parties.

In addition, by taking my case for review the U.S. Supreme Court can define the meaning of what is an agent of the state in visitation/custody matters and whether State Court Judges can cloak custodial parents with enough state authority to convert them into agents of the State.



Mark Babinski, Appellant, Pro Se

Date: September 6, 1994

UNITED STATES SUPREME COURT

October Term 1994

MARK BABINSKI,
Petitioner

v.

PATRICIA REGUCCI, ZOFIA BABINSKI,
JOHN AKERS, RICK HELLAN
Respondents

APPENDIX

to

PETITION FOR
WRIT OF CERTIORARI
to
THE U.S. COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

/stamped: FILED Aug 11 1993 AT 8:30
WILLIAM T. WALSH CLERK/

MARK BABINSKI, Plaintiff, v. PATRICIA REGUCCI, ZOFIA BABINSKI, JOHN AKERS and RICK HELLAN, Defendants	Civ.No. 92-5510 (HLS) O R D E R

This matter having come before the court upon the motions of defendants John Akers and Patricia Regucci to dismiss plaintiff Mark Babinski's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted and upon plaintiff's motion for summary judgment against defendant Zofia Babinski and upon the court's own motion; and the court having considered the submissions of the parties; and for the reasons expressed in the accompanying opinion; and for good cause shown,

IT IS this 11 day of August 1993, hereby

ORDERED the motions of defendants Akers and Regucci to dismiss plaintiff's complaint are granted; and it is further

ORDERED that plaintiff's motion for summary judgment against defendant Zofia Babinski is denied; and it is further

ORDERED that plaintiff's complaint is dismissed as to defendants Zofia Babinski and Rick Hellan; and it is further

ORDERED that the Clerk of the Court dismiss plaintiff's complaint in its entirety with prejudice.

/signature: H. Lee Sarokin/

H. LEE SAROKIN
U.S. District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

/stamped: FILED Aug 11 1993 AT 8:30
WILLIAM T. WALSH CLERK/

MARK BABINSKI, Plaintiff, v. PATRICIA REGUCCI, ZOFIA BABINSKI, JOHN AKERS and RICK HELLAN, Defendants	Civ.No. 92-5510 (HLS) O P I N I O N

Sarokin, District Judge

Before the court are motions by defendants John Akers and Patricia Regucci to dismiss plaintiff's complaint against them. [1]

Background

This lawsuit arises out of plaintiff Mark Babinski's acrimonious divorce from his former wife, defendant Zofia Babinski, and their subsequent disputes over the custody of their now 13 year-old

---

[1]. Also before the court is plaintiff's motion for summary judgment against Zofia Babinski. However, because Ms. Babinski has not yet answered plaintiff's complaint, summary judgment is not available. Accordingly, the court has not considered the papers filed by plaintiff in support of this motion.

son Thomas. Plaintiff makes the following allegations in his complaint. [2]

Within one month after the judgment of divorce between plaintiff and his former wife was entered by the Superior Court of New Jersey, Union County on May 2, 1988, plaintiff sought increased visitation rights with Thomas. In considering plaintiff's application, the Honorable John M. Boyle entered a series of orders, requiring plaintiff, his former wife and Thomas to submit to psychiatric evaluations and counseling through the Family and Children's Counseling and Testing Center of Elizabeth, New Jersey (the "Center" or the "Elizabeth Counseling Center").

Although Zofia Babinski and Thomas were evaluated by the Center in August and September, they did not receive any follow-up counseling from the Center as ordered by Judge Boyle in October. As a result, Judge Boyle issued another order, directing Zofia Babinski and Thomas to undergo further evaluation and counseling at the Center. According to plaintiff's complaint, while Zofia and Thomas were evaluated in February of 1989, they never received any counseling at the Center. Cmplt. at 4.

Instead, plaintiff alleges that Zofia Babinski took Thomas to Personal Performance Consultants ("PPC"), a counseling service provided to her free of charge as an employee of the International Business Machines Corporation ("IBM"). At PPC, Thomas was seen by defendant Patricia Regucci, a

---

[2]. The court notes that plaintiff's allegations tell a confusing and often inconsistent story.

therapist licensed by the State of New Jersey. Plaintiff alleges that defendant Regucci "provided counseling to Thomas fully aware that it was in preparation for his court ordered evaluation ... " Cmplt. at 4.

Plaintiff further alleges that the counseling provided by defendant Regucci was in "violations [sic] of the standards of her profession and that she knew "she was not to provide counseling, did so, brainwashing ... Thomas to instill in him good feelings to wards his mother and bad feelings towards [plaintiff]." Id. at 5.

On April 19, 1989, Judge Boyle held a hearing regarding plaintiff's application for increased visitation. Plaintiff maintains that "[a]s a result of the illegal counseling provided by Patricia Regucci to my son Thomas, Judge John M. Boyle denied me the requested expansion of visitation with Thomas." Cmplt. at 5-6. Specifically, plaintiff asserts in his complaint that:

> Therefore, on April 19, 1989 Hon. John M. Boyle, J.S.C., under the color of state law, custom and policy denied me the liberty of visitation with my son - without due process.
>
> ...
>
> I was denied my 14th Amendment protected rights by Judge Boyle because of the activities of Defendants Zofia Babinski, Patricia Regucci, John Akers and Rick Hellan. [3]

Id. at 6.

Seemingly contradicting his characterizations of defendant Regucci's counseling of Thomas as "illegal" and as in violation of Judge Boyle's orders that counseling be obtained at the Elizabeth Counseling Center, plaintiff alleges that although he initially viewed the counseling provided to Thomas by Patricia Regucci as unconnected to Judge Boyle's orders and as "additional, not Court ordered but merely voluntary, counseling," Cmplt. at 8, he changed his view of the counseling in the course of his professional negligence lawsuit against defendant Regucci filed in New Jersey state courts in 1990. [4] Id. At that time, plaintiff "became aware of [the] fact [that] Thomas was seen by Defendant Patricia Regucci because of Judge Boyle's Orders." Id.

Lastly, plaintiff alleges that defendant Regucci rendered services to Thomas pursuant to an agreement between IBM and PPC. According to plaintiff, "[t]he Agreement clearly shows that IBM management encouraged IBM employees to

---

[3]. Perhaps contradicting himself, plaintiff alleges that he never heard of Patricia Regucci until, in response to a suit he filed in state court toward the end of 1989 in order to determine whether his former wife had undergone counseling as ordered by Judge Boyle, defendant Regucci submitted a letter stating that she had counselling sessions with Zofia and Thomas.

[4]. This suit was dismissed as to IBM and summary judgment granted in favor of Ms. Regucci.

make use of the services of PPC by contractual agreement and that there was a tight coupling of the management of the two companies." Cmplt. at 10. Plaintiff further alleges that:

> Ultimately, the responsibility for the conduct of Patricia Regucci, an employee of PPC, lies with Rick Hellan, President of PPC, who established and implemented policies and procedures to be used by PPC employees when providing services to children of divorced parents.
>
> Ultimately, the responsibility for the conduct of Zofia Babinski, an employee of IBM, lies with John Akers, Chairman of IBM. John Akers has not only implemented policies and procedures which permitted and encouraged violation of my civil rights but also, in name of affirmative action, encourage [sic] female IBM employees to support alternative lifestyles, destroy traditional family values and use various IBM company resources to intefere in private family matters.
>
> That is why Rick Hellan, in his capacity as President of PPC, and John Akers, in his capacity as Chairman of IBM, are named here as Defendants.

Id. at 11.

On December 31, 1992, plaintiff filed suit against defendants, asserting that their alleged actions violated his civil rights enforceable pursuant to 42 U.S.C. Section 1983. Plaintiff seeks compensatory and punitive damages,

especially from defendants Akers and Hellan, attorney's fees and injunctive relief. [5]

Discussion

Defendants Akers and Regucci move to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) primarily on grounds that they are private actors not subject to suit under Section 1983, which imposes liability for violations of federal law only upon persons acting under color of state law. [6]

This court can only grant a motion to dismiss if, reading all inferences of the Complaint in plaintiff's favor, there is no set of facts on which plaintiff can prevail. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Scheuer v. Rhodes, 416 U.S.

---

[5]. The court notes that as of the date of this opinion, service has not been executed as to defendant Hellan. Service has been executed as to the remaining three defendants, of whom only defendant Zofia Babinski has failed to answer plaintiff's complaint.

[6]. Defendant Akers further argues that plaintiff has failed to allege the deprivation of any federal right. Defendant Regucci also asserts that this action is barred under the doctrine of res judicata. However, the court cannot reach the merits of defendant's res judicata argument on a motion to dismiss as this would require examination of documents extraneous to the pleadings. See Fed. R. Civ. P. 12.

232, 236 (1974). As defendant Akers correctly notes in his brief to the court, the court need only accept as true allegations regarding the legal effect of events set forth in plaintiff's complaint. See C. Wright & A. Miller, Federal Practice and Procedure, Civil 2d Section 1357 at 319-20 (2d ed. 1990).

I. The Elements of a Section 1983 Claim

It is well settled that in order to state a claim upon which relief can be granted under Section 1983, a plaintiff must allege both that the conduct complained of deprived him of rights, privileges, or immunities secured by the Constitution or federal law and was committed by a person acting under color of state law. Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled on other grounds by Daniels v. Williams, 474 U.S. 327 (1986); see also Edwards v. City of Philadelphia, 860 F. 2d 538, 573 (3d Cir. 1988) (holding that in order to make a prima facie case under Section 1983, the plaintiff must demonstrate that an individual acting under color of state law deprived him of a federal right).

In an opinion that has been characterized as "opaque" by the Third Circuit, see Robb v. City of Philadelphia ,733 F. 2d 286, 288 (3d Cir. 1984), in Lugar v. Edmonson Oil Co., the United States Supreme Court undertook a complex analysis of the elements of a Section 1983 claim, considering at great length the relationship between the state action requirement of the Fourteenth Amendment, which makes federal constitutional rights available against the states, and the "under color of state law" component of Section 1983, which provides a remedy for

constitutional violations. 457 U.S. 922 (1982). The Lugar Court stated:

> Our cases have ... insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of 'fair attribution.' First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible ... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.

Id. at 937. "Without a limit such as this", the Court added, "private parties could face constitutional litigation whenever they seek to rely on some state ruling governing their interactions with the community surrounding them." Id.

The Lugar Court pointed out that the requirements that the deprivation be caused by the state and that it actually occur at the hands of a state actor "collapse when the claim of constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his official decisions." Lugar, 457 U.S. at 937. Indeed, when "a Section 1983 action is brought against a state official, the statutory requirement of action "under color of state law" and the

state action requirement of the Fourteenth Amendment are identical." Id. at 929. However, [t]he two principles diverge when the constitutional claim is directed against a party without such apparent authority, i.e., against a private party." Id. at 937.

In such a case, to survive a motion to dismiss, the Section 1983 plaintiff must allege that: 1) "the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority," i.e. a state deprivation; and, 2) that the ostensibly private party defendants "may be appropriately characterized as 'state actors.'" Id. at 939. Considering plaintiff's complaint in light of this analysis, it is clear that plaintiff's complaint fails on both counts.

A. State Deprivation

The gravamen of plaintiff's complaint is that he was deprived of his Fourteenth Amendment liberty interest in his son Thomas' care, custody and management when Judge Boyle denied plaintiff increased visitation rights, allegedly as a result of the "illegal" counseling provided to Thomas by defendant Regucci at the instigation of Thomas' mother, defendant Zofia Babinski, under the direction of defendant Hellan and paid for by IBM. Put another way, although the actual deprivation was Judge Boyle's decision to deny plaintiff increased visitation with Thomas, according to plaintiff, it was the conduct of the private party defendants in relation to the counseling activities that led to the deprivation.

With regard to this conduct, plaintiff repeatedly alleges in his complaint that defendant Zofia Babinski failed to comply with Judge Boyle's orders that she and Thomas obtain counseling at the Elizabeth Counseling Center. Plaintiff also alleges that defendant Regucci knew "she was not to provide counseling" to Thomas and that her counseling to Thomas was "illegal". Thus, plaintiff alleges that these defendants failed to heed Judge Boyle's orders, not that they acted in compliance with orders.

Accepting these allegations as true, as the court must in considering a motion to dismiss, the court concludes that plaintiff has failed to allege that his deprivation was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom he state is responsible." Lugar, 457 U.S. at 937 (emphasis added). A discussion of the facts and holdings of Lugar makes this clear.

At issue in Lugar was a Virginia statute permitting private parties to obtain pre-judgment attachment of property under certain circumstances. In his complaint against the private parties that made use of this statute against him, the plaintiff alleged "that the deprivation of property resulted from [defendants'] 'malicious, wanton, willful, opressive [sic], [and] unlawful acts." Lugar, 457 U.S. at 940. "By 'unlawful,'" the Court concluded, "[plaintiff] apparently meant 'unlawful under state law.'" Id. In determining that plaintiff has thus failed to allege that defendants' alleged deprivation could be fairly attributed to the State of Virginia, the Court stated:

> To say [that the conduct was 'unlawful under state law'] is to say that the conduct of which [plaintiff] complained could not be ascribed to any governmental decision; rather [defendants] were acting contrary to the relevant policies articulated by the State.

457 U.S. at 940. Accordingly, plaintiff's complaint alleged no state involvement in the alleged deprivation and therefore did "not state a cause of action under Section 1983 but challenged only private action." Id.

Similarily, the plaintiff in this case has alleged that Thomas' counseling sessions with defendant Regucci were "illegal" and in violation of Judge Boyle's orders that the counseling take place at the Elizabeth Counseling Center. As such, defendants' alleged activities with regard to Thomas' counseling are wholly unrelated to any law, action or procedure implemented by the State of New Jersey. Because plaintiff has failed to allege that defendants' activities are related to any activity by the State, and indeed has alleged that defendants' activities were contrary to orders issued by a New Jersey judge, plaintiff cannot have been deprived of any Fourteenth Amendment liberty interest by defendants' activities. Accordingly, it would seem clear that the court must dismiss plaintiff's complaint as to all defendants. [7]

---

[7]. Although only defendants Regucci and Akers have sought dismissal, it is clear upon review of the complaint that the allegations relevant to the court's consideration of the state action issues apply equally to all of the defendants to this lawsuit.

Before reaching this conclusion, however, the court deems it necessary to discuss plaintiff's allegation, which contradicts all of his other allegations, that in the course of his state court professional negligence lawsuit against defendant Regucci he "became aware of [the] fact [that] Thomas was seen by Patricia Regucci because of Judge Boyle's Orders." Cmplt. at 8.

By this allegation, plaintiff seems to suggest, albeit contrary to all of his other allegations, that defendant Regucci's counseling of Thomas resulted from Judge Boyle's orders, rather than being in violation of these orders. However, even taking this allegation in the light most favorable to plaintiff, this allegation does not save plaintiff's complaint.

It is well-settled in this Circuit that a private decision can only be attributed to a state when the state "'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [state].'" Robinson v. Canterbury Village, Inc., 848 F.2d 424, 428 (3d Cir. 1988) (quoting San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 546 (1987)).

As plaintiff alleges throughout his complaint without inconsistency, Judge Boyle's orders all directed that Thomas be evaluated and receive counseling at the Elizabeth Counseling Center. As such, Judge Boyle's orders simply cannot be characterized as having compelled the counseling Thomas received from defendant Regucci. Absent this compulsion, defendants' alleged activities cannot be fairly attributed to the State of New

Jersey and thus plaintiff's Section 1983 complaint must be dismissed for failing to state a claim upon which relief can be granted.

B. Under Color of State Law

Even assuming that plaintiff's allegations cleared the first hurdle and sufficiently alleged a deprivation related to state activity, plaintiff's complaint would still be subject to dismissal for failing to allege that defendants acted under color of state law, the second element of a Section 1983 claim.

In National Collegiate Association v. Tarkanian, 488 U.S. 179 (1988), the Supreme Court set forth the general parameters of action taken under color of state law. The Court stated:

> 'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.'

Id. at 191 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). The Court added:

> In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the state was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing conduct, if it delegates its authority to the private actor,

> or sometimes if it knowingly accepts benefits derived from unconstitutional behavior.

Id. at 192. However, in Tarkanian, the final act challenged was action taken by a state university, which is clearly a state actor. Thus, the Court found that the question before it was not whether the university "participated to a critical extent in the [defendant's] activities, but whether [the university's] actions in compliance with the [defendant's] rules and recommendations turned the [defendant's] conduct into state action." Id. at 193.

This case is like Tarkanian in that the final act challenged by plaintiff is the decision by Judge Boyle, clearly a state actor, not to increase plaintiff's visitation rights with Thomas. It is also like Tarkanian in that plaintiff seeks to hold defendants, who are private actors, liable for the alleged influence that defendant Regucci's alleged "brainwashing" of Thomas had on Judge Boyle's decision.

Finally, this case is like Tarkanian in that this court concludes that the alleged connection between defendant Regucci's counseling of Thomas and Judge Boyle's decision to deny plaintiff increased visitation rights, as a matter of law, does not render the activities by the defendants to this action in connection with that counseling state action. If defendants' alleged actions were to be deemed state action in this context, the law would have to be that all persons who participate in proceedings before state officials or who contribute to the decisions made by state officials -- lobbyists, witnesses,

experts, etc. -- are state actors. Because this is not the law, plaintiff's complaint has failed to allege that defendants acted under color of state law.

II. Leave to Amend

Finally, the court must consider plaintiff's request that, in the event that the court finds his original complaint to be defective, which is the case for reasons discussed supra, the court permit him to file an amended complaint "that would be sufficient to cure the deficiency as to 'factual specificity' and the nature of the claim." Plt. Opposition to Akers at 13.

As a general matter, the United States Supreme Court has stated that courts should freely grant leave to amend a complaint when justice requires. Foman v. Davis, 371 U.S. 178, 182 (1962). A factor to be considered in determining whether justice so requires is the utility or futility of such amendment. See id. (stating that "[i]f the underlying factors or circumstances relied upon by plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.").

In the Third Circuit, a Section 1983 plaintiff whose complaint is dismissed for lack of specifdicity must be given a reasonable opportunity to cure the defects in his complaint. Darr v. Wolfe, 767 F.2d 79, 81 (3d Cir. 1985).

In considering plaintiff's complaint in light of these principles, the court concludes that plaintiff should not be granted leave to amend his complaint.

Plaintiff's complaint does not suffer from a lack of specificity. Rather, plaintiff's very detailed complaint alleges facts that, taken as true, provide no basis for any legal relief. As such, amendment would be clearly futile.

Furthermore, permitting plaintiff to amend his complaint, which would ultimately require the court to expend scarce resources in reviewing plaintiff's pleadings again, encroaches on the rights of those litigants with claims that deserve the court's attention.

For these reasons, the court denies plaintiff's request that he be granted leave to amend his complaint.

Conclusion

For the foregoing reasons, the court hereby grants defendant Akers' and Regucci's motion to dismiss plaintiff's complaint, denies plaintiff's motion for summary judgment against defendant Zofia Babinski and, upon its own motion, dismisses plaintiff's complaint as to defendants Zofia Babinski and Rick Hellan. Plaintiff's complaint is dismissed in its entirety with prejudice.

/signature: H. Lee Sarokin/

H. Lee Sarokin
U.S. District Judge

Date: August 11, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5554

MARK BABINSKI,
Appellant

v.

PATRICIA REGUCCI; ZOFIA BABINSKI; JOHN AKERS, Chairman, IBM Corp.; RICK HELLAN, President, PPC Inc.

On Appeal From the United States District Court For the District of New Jersey
(D.C. Civil Action No. 92-cv-05510)
District Judge: Honorable H. Lee Sarokin

Submitted March 11, 1994

BEFORE: STAPLETON, HUTCHINSON and ROTH,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court entered August 12, 1993, be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/signature: Walter K. Stapleton/

Circuit Judge

ATTEST:

/signature: P. Douglas Sisk/

Clerk

Dated: May 5 - 1994

Certified as a true copy and issued in lieu of a formal mandate on May 27, 1994.

Teste: /signature: P. Douglas Sisk/

Clerk, U.S. Court of Appeals for the Third Circuit